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No. _____

In the Supreme Court of the United States

October Term, 1996

UNITED STATES OF AMERICA ex rel.
ALNOOR VIRANI,

Petitioner,

v.

HALL & PHILLIPS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit's statutory construction of the fee-shifting provisions of the False Claims Act is in conflict with Supreme Court authority concerning other federal fee-shifting provisions.

2. Whether the fee award provisions of the False Claims Act, which state that the qui tam plaintiff "shall . . . receive" the attorney's fee award (31 U.S.C. § 3730(d)(1)), was incorrectly interpreted by the Ninth Circuit in its holding that under "no condition" is the qui tam plaintiff "entitled to receive direct payment of those fees" from the defendant.

3. Whether the decision of the Ninth Circuit disregards and impinges upon the state's traditional authority over the determination of contractual disputes and the professional conduct of attorneys practicing within California.

4. Whether the Ninth Circuit's decision is at odds with the decisions of other circuit courts.

PARTIES TO THE PROCEEDING

Petitioner, Alnoor Virani, was the relator in the trial court action pursuant to the *qui tam* provisions of the False Claims Act, and was at that time represented by the law firm of Hall & Phillips ("HP") respondent herein.

Jerry M. Lewis Truck Parts & Equipment Inc. and Steven Lewis ("Lewis") were defendants in the trial court action.

HP was the appellant in the appeal to the Ninth Circuit of the district court's order wherein both Virani and defendants were appellees. (A related appeal was also brought by Lewis from a portion of the district court's order in which HP was appellee in Ninth Circuit Case No. 95-56456.)

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PETITION FOR WRIT OF CERTIORARI

Qui tam plaintiff, Alnoor Virani, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 89 F.3d 574 (1996) and is reprinted in the appendix ("App.") at App. 1.

The District Court's unpublished order directing the award of the statutory attorney's fee amount in the first instance to *qui tam* plaintiff Virani is reprinted at App. 19-37.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered July 10, 1996. Virani filed a timely Petition for Rehearing and Suggestion for Rehearing en Banc, which was denied on August 21, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISION

The provision governing the award to a *qui tam* plaintiff in a False Claims Act case provides, in pertinent part, that in addition to a variable percentage share from the Government's recovery:

> Any such *person* [the *qui tam* plaintiff] *shall* also *receive* an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs.
>
> 31 U.S.C. § 3730(d)(1); emphasis added.

STATEMENT OF THE CASE

This Court has explicitly ruled that fee-shifting provisions generally authorize a fee award to successful *parties*, not to their counsel. *Venegas v. Mitchell*, 495 U.S. 82, 87 (1990). The Ninth Circuit Court of Appeals has now ruled, however, that in the fee-shifting provisions of the False Claims Act, 31 U.S.C. § 3730(d)(1), *under no condition* (App. 11) is the party entitled to directly receive such award, and that, as a matter of statutory construction of this federal fee-shifting provision, such an award must, in all instances, be paid directly to counsel, regardless of the specific terms of the private contractual agreement between attorney and client delineating the attorney's contractual entitlement to compensation, and regardless of any claim of breach of duty in the fiduciary relationship between attorney and client which might otherwise, under state law, reduce or negate the attorney's entitlement to compensation.

Although the Supreme Court has had numerous occasions to address the fee-shifting provisions of other federal laws, it has never before focused upon the particular provisions concerning a fee award to a successful *qui tam* plaintiff, or relator, under the False Claims Act, as amended in 1986.

This Court has also spoken to the role of the trial court in the assessment of "reasonable" attorney's fees, and drawn a line of demarcation between a federal court's proper role in determining the lodestar amount which fixes what the losing *defendant* must pay, versus the issues which relate to what the successful plaintiff is obligated to pay his or her attorney.[1]

The clear import of previous Supreme Court decisions in this area has been that the function of the federal court is the interpretation and application of the federal fee-shifting statute, a function which is independent of the private contract existing between attorney and client. This Court has, however, never explicitly stated that any subsequent fee dispute between the successful plaintiff and the attorney is a matter to be determined according to the state laws which govern the formation and performance of private fee agreements. Petitioner submits that in this case the Ninth Circuit, in the guise of statutory construction, has overridden the right of private contract and the traditional authority of the state to govern such contracts and the professional conduct of attorneys.

The circumstances in which the fee dispute arose herein are somewhat unusual. Questions of ethical misconduct possibly affecting the fee award were first raised not by the client, but by the defendant below. Only later did the client, Petitioner Virani, learn what the defendant discovered during the process of litigating the lodestar amount with Virani's then attorneys, Hall & Phillips

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[1] A fee-shifting statute "controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer." *Venegas v. Mitchell*, 495 U.S. 82, 90 (1990).

("HP"), which involved the true financial relationship between HP and an organization known as Taxpayers Against Fraud ("TAF").[2]

The underlying case was instituted in 1989 by petitioner Virani, a former employee of the defendant Jerry M. Lewis Truck Parts and Equipment, Inc., and was brought pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730. After the government's intervention, the parties settled the case in January, 1992. The district court dismissed the case in chief, reserving jurisdiction over Virani's claim for attorney's fees under 31 U.S.C. § 3730(d)(1).

In the course of litigating the fee amount, the defendant Lewis sought discovery of the fee agreements between the law firm of Hall & Phillips ("HP" the respondent herein) and its client Virani, as well as those between HP and the organization Taxpayers Against Fraud ("TAF"). These agreements were ultimately provided to Lewis after a successful motion to compel forced such disclosure.

The basic operation and structure of HP's fee arrangements involved representation of individual *qui tam* plaintiffs such as Virani, *if* such individuals would

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[2] That relationship, and the serious ethical questions implicit in HP's dealings with TAF had, however, already been the subject of inquiry by the Sixth Circuit Court of Appeals. See *United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, 1043-49 (6th Cir. 1994). Attorney John Phillips had, moreover, admitted that the fee arrangements in Virani's case were substantially identical to those in the *General Elec. Co.* action.

agree to allow TAF to enter the case as a co-plaintiff. The supposed advantage to the individual relator was that TAF would agree to cover the costs of litigation (i.e., filing fees, deposition expenses, etc.) and in return TAF would receive a considerable portion of the percentage award provided to a successful relator (here, 40%) under 31 U.S.C. § 3730(d) out of the government's recouped funds. TAF was presented to such potential clients of HP as a nonprofit organization which would use any excess amount of the percentage award ceded to TAF by any one successful relator to fund other False Claims Act *qui tam* actions, thus promoting the common good by allowing other relators personally unable to cover the costs of litigation to prosecute their suits. Unbeknownst to the individual client, however, a significant portion of any award received by TAF was not earmarked for the public interest purpose of fostering other meritorious *qui tam* cases, but was instead rerouted to HP as a substantial and *undisclosed* contingency fee.[3]

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[3] HP's fee from TAF was initially 50%, which was later increased to 66%. Since TAF was to receive 40% of Virani's total *qui tam* share, HP's undisclosed contingency fee amounted to 20% of Virani's award, later increased to 26%.

Although the agreement between TAF and Virani did state that if it became "necessary," in TAF's judgment to relinquish a portion of its share to counsel "in order to provide the most effective representation in the case," that it would not be necessary for Virani to approve such arrangements (App. 21), what Virani was not told was that such "relinquishment" would largely go to HP, the firm already *retained* by Virani, and therefore *already* obligated to provide "effective representation" in the case. Nor was Virani advised of the percentage amounts which would go to HP via TAF. In effect, by this circuitous arrangement, HP acquired a built-in contingency enhancement,

In HP's fee agreements with the individual relator, HP purported to charge the client *no* fee, but required the client to assign all rights to the court-awarded statutory fee amount to HP. The upshot of this arrangement was that in a successful action HP was able to recoup not only the full fee amount of the statutory award, but a substantial *additional* contingency fee award from the fees funneled to it through TAF without the individual client's knowledge.

California's *Business and Professions Code* § 6147 governs contingency fee agreements and explicitly requires *inter alia*, that the agreement be in writing, and include the fee rate agreed upon, a "statement as to how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery," a "statement as to what extent, if any, the client could be required to pay any compensation to an attorney for related matters that arise out of their relationship not covered by their contingency fee contract," and a statement that the fee is not set by law, but is negotiable.

In other words, this state provision codifies the ethical obligation of full disclosure, and further provides that a failure to comply with any provision renders the agreement voidable at the client's option and limits the attorney's compensation to a "reasonable" fee, rather than the contracted for amount.

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above and beyond the "reasonable" fees of the statutory award. Cf. *Burlington v. Dague*, 505 U.S. 577, 566 (1992) (contingency enhancement above lodestar amount incompatible with fee-shifting statutes).

Notably, this state law reduces an attorney's entitlement from the contracted-for fee to no more than a quantum meruit amount merely for failing to adequately disclose these various matters, *even if* the agreement is in all other respects valid, enforceable, and the fee itself not unconscionably high. This is a clear indication of the serious approach the State of California takes to its authority to regulate attorney/client relationships. Where, however, counsel's conduct implicates a conflict of interest, fraud, other "acts of impropriety inconsistent with the character of the profession, and incompatible with the faithful discharge of its duties," the Supreme Court of California has ruled that such misconduct, "will prevent a lawyer from recovering fees for services rendered." *Clark v. Millsap*, 197 Cal. 765, 785 (1926).

HP's fee arrangements essentially circumvented these requirements. By inducing the individual relator to accept TAF as a co-plaintiff and to cede a considerable portion of his percentage share award to TAF (here, 40%), HP was able to conceal the true amount of HP's compensation, which in fact included not only the "reasonable" costs and fees to be recovered directly from the defendant pursuant to 31 U.S.C. § 3730(d)(1), but an additional bonanza in the form of an undisclosed contingency fee routed to it through TAF.

The ethical questions presented by these arrangements did not merely concern whether the total amount accruing to HP constituted an unreasonably high sum or a lack of full disclosure as required by California's *Business and Professions Code* § 6147. Such conduct raised

issues of fraud in the very inducement of the fee agreement, and further implicated an inherent conflict of interest which permeated the entire attorney/client relationship between HP and its individual client. By securing TAF's position as a "co-plaintiff" in any False Claims Act lawsuit, HP obtained a "lock" on the case. Even if a client were to seek later to discharge HP as counsel, HP would still maintain substantial control over and participation in the case as counsel to the "co-plaintiff" TAF.[4] Furthermore, the individual client was induced to give up all control over the settlement of the suit to HP on the purported grounds that the simultaneous representation of TAF *required* HP to have such ultimate control.

When the details of these unusual fee arrangements were disclosed to the defendant, Lewis argued that the award of $316,500 in fees was not "reasonable" in light of the hidden contingency fee routed to HP through TAF. HP, however, consistently maintained that Virani was fully aware of all the financial arrangements involved and approved of those arrangements. Based upon those representations, the magistrate assigned to determine the

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[4] This is precisely what occurred in the companion case to Virani's action, *United States ex rel. Taxpayers Against Fraud and Killingsworth v. Teledyne*, No. 94-56482, unpublished, decided by the Ninth Circuit the same date as was the instant action. In Virani's case, however, even after TAF withdrew as an actual party to the lawsuit in the face of a challenge to its standing as a proper *qui tam* plaintiff, Virani was induced to execute yet another agreement with TAF confirming its 40% share of any potential recovery. Thus, even *after* the organizational entity was no longer even a party to the case, HP *still* maintained its "lock" on its undisclosed contingency fee.

lodestar amount of the statutory award concluded that since the False Claims Act fee-shifting provision "does not concern itself with [the] fee arrangements between the *qui tam* plaintiff and his or her counsel," and since Virani apparently had no dispute with the fee arrangement, the defendants could not challenge the overall reasonableness of the total compensation (statutory plus contingency fee award) since "[t]o rule otherwise would bestow an unjustified windfall upon Defendants." The report and recommendations of the magistrate were subsequently adopted by the district court on July 23, 1993. Defendants filed notice of appeal of that order, but while appeal was pending counsel for defendants and HP entered into discussions to negotiate a settlement of the dispute concerning the fee amount to be paid by defendants.

Throughout such negotiations, HP had consistently represented to defendants and to the court that Virani was fully aware of the negotiations and the issues involved. In fact, Virani had *never* been advised by HP of the existence of the dispute between the defendants and HP over the "reasonable" amount of attorney's fees, nor had he been advised of the nature of the accusations made against HP concerning the fee arrangements between HP and TAF, and indeed did not learn of those arrangements or any of the issues relating to the fee dispute concerning the lodestar amount until he personally went to the courthouse in November or December of 1993 to review the papers in the district court's case file. Virani therefore refused to sign the proposed settlement agreement which required direct payment of the fee amount to HP.

In January, 1995, defendant Lewis moved for a status conference and briefing schedule on the as yet unresolved fee issues. Reconsideration of the district court's previous order was sought in light of the new evidence that Virani, contrary to HP's representations, had not been apprised of the true relationship and financial arrangements between HP and TAF and that since Virani himself disputed HP's entitlement to both the undisclosed contingency fee and all statutory fee amounts, defendants now required guidance from the district court as to whether the statutory fee amount should be directed to Virani or to HP.

On August 25, 1995, the district court issued its order. (App. 19) The district court, based upon its reading of this Court's decisions regarding other fee-shifting provisions concluded that the statutory provision meant precisely what it said, that the *qui tam* plaintiff was "the person" who "shall . . . receive" the fee award in the first instance, since it is the party, not the attorney, who is actually entitled to the award. The district court declined to reconsider the reasonableness of the statutory award amount as had been requested by defendants. (App. 37)

Significantly, the district court's order did not purport to resolve issues not properly before it. In other words, the trial court merely construed the language of the specific federal provision in question and recognized that the quintessentially factual issues of whether Virani's fee agreement was fraudulently induced, whether a conflict of interest pervaded that attorney/client relationship, or whether other ethical violations or breaches of fiduciary duty which would, under California law, affect HP's entitlement to compensation, had not been litigated

before it and would require resolution through a separate proceeding. Thus, the district court merely ruled that, a matter of statutory construction, Virani was entitled to collect the fee in the first instance without reaching the ultimate issue of whether Virani or HP might ultimately prevail in their fee dispute.

HP appealed the district court's decision and on July 10, 1996, the Ninth Circuit Court of Appeals issued its decision. (App. 1) The Ninth Circuit took an entirely different view. Despite the plain language of the statute, and the brief nod given to this Court's decisions in *Evans v. Jeff D.*, 475 U.S. 717 (1986), *Venegas v. Mitchell*, 495 U.S. 82 (1990), and its own decision in *Willard v. City of Los Angeles*, 803 F.2d 526 (9th Cir. 1986), the Ninth Circuit ruled that the client, the actual party to the litigation, did not really have a right to receive the fee award, but only the "power" to confer the award upon counsel. "In other words the fee is for the attorney, and the attorney should receive it," the appellate court wrote, "Under *no condition* was [the client] entitled to receive direct payment from [defendants]" (App. 11; emphasis added.) Thus, the Ninth Circuit explicitly held that *regardless* of the specific terms of the private fee contract between attorney and client, as a matter of federal statutory construction in all False Claims Act cases the fee award of 31 U.S.C. § 3730(d)(1) must be provided, in full, directly to the plaintiff's counsel rather than to the plaintiff.[5]

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[5] The Ninth Circuit reasoned that "Were the rule otherwise, plaintiffs would obtain possession of fee awards, and attorneys would be left to obtain the money paid for their services as best they could. Left to the normal vicissitudes of life, substantial

Notably, this reasoning was not even persuasive to the entire Ninth Circuit panel. In his concurring opinion, Judge Thomas stated that, "absent a contractual assignment to the attorney, the False Claims Act requires payment of the attorneys' fee award to the party, with the ultimate disposition of the award dependent upon the contract between the attorney and client." (App. 15) Judge Thomas viewed the majority's opinion to be contrary to the plain language of the statute and at odds with applicable Supreme Court authority. With respect to the majority's "powers" analysis, Judge Thomas wrote:

> The majority seems to analogize the False Claims Act fee provisions to the creation of a

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sums would be diverted from their intended purpose. Actions of the client or the client's creditors (or heirs) would often intervene. That would not only thwart the Congressional purpose, but would make no sense at all and would lead to unconscionable results." (App. 11)

Petitioner submits that such reasoning is deeply flawed. In the first place, one would hope that, under usual circumstances, counsel would not engage in fraud, overreaching or serious ethical violations in the formation and performance of their employment agreements, and that a successful plaintiff would likewise, under ordinary circumstances, comply with his or her contractual obligations to render the compensation to counsel delineated in their private agreement. The circuit court's reasoning construes federal law with the apparent assumption clients will necessarily violate their obligations under fee agreements, and that attorneys consequently require some kind of extra-contractual security in the form of a direct statutory award. As this Court has stated, however, "These statutes were not designed as a form of economic relief to improve the financial lot of lawyers." *Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air*, 478 U.S. 546, 565 (1986), (Delaware Valley I.).

> special power. Because the governing fee agreement in this case contains restrictions, I agree. However, the majority implies that this theory ought to apply in every case regardless of the provisions of the attorney-client contract. In my view, the more appropriate analogy is to that of a general power which would give the client control over the property unless restricted by contract. This reasoning is consistent with the False Claims Act and general case law concerning federal fee-shifting statutes.
>
> (App. 18)

Despite Judge Thomas' distinctly different approach, he nevertheless concurred in the result, and stated, "I have absolutely no conflict with the result because Virani assigned his right to court-awarded attorneys' fees to his lawyers." (App. 15) What Judge Thomas apparently failed to realize, however, was that it was the validity of this very assignment which was at the heart of the *contractual* dispute between Virani and his former counsel. Furthermore, because the district court had expressly declined to hear the various matters concerning fraud in the inducement, conflict of interest, and breach of fiduciary obligation affecting the validity of the fee agreement, there simply was no basis in the record before either the district court or the appellate court to conclude that the assignment was valid.

In addressing defendant Lewis' separate challenge to the reasonableness of the fee award the Ninth Circuit set forth a series of inconsistent statements which support Virani's contention that the appellate court's statutory interpretation was fundamentally flawed. The Ninth Circuit first acknowledged that the district court had neither

addressed nor ruled upon the question of whether HP acted ethically in its treatment of Virani (App. 12), and further stated that, "It is possible that some aspects of the fee arrangements were not entirely proper." The appellate court recognized that, under California law, when a conflict of interest exists between attorney and client, and particularly where such conflict pervades the entire relationship, "the appropriate fee for the attorney is zero." (App. 12) Yet after stating quite clearly that the district court had *not* entertained the substantive issues involving ethical violations, the appellate court concluded, "However, there is no hint in this case that there was any conflict of interest whatsoever." (App. 13)

Such conclusion was flatly wrong. Despite the fact that the allegations of unethical conduct were not litigated in the district court, there was certainly a great deal more than a hint of conflict of interest involved in HP's fee arrangements, which had already been seriously questioned in the Sixth Circuit's decision in *United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, 1043-49 (6th Cir. 1994). Indeed attorney John Phillips, a partner in HP, had already been rebuked by the California Bar Association for his failure to disclose the inherent conflicts of interest involved in HP's standard arrangement of involving TAF as a co-plaintiff in the *qui tam* cases it handled. The ethical concern was not *only* that by acquiring an assignment of all statutory fees while secretly obtaining an undisclosed additional fee through TAF, HP received an unconscionably high cumulative fee, but that by establishing TAF as a "co-plaintiff" in the case from the outset HP acquired what

amounted to an actual interest in the case itself, a situation fraught with conflict from its inception and which necessarily pervaded the relationship between HP and its individual client thereafter.

There were, therefore, serious concerns directly implicating attorney/client conflict of interest which, as even the appellate court admitted, under California law, would affect HP's entitlement to compensation to a considerable extent. The majority opinion skirted this question by stating that there was only a "taint of some impropriety" (App. 14) rather than an actual conflict of interest, even though the factual questions of either impropriety or conflict had admittedly never actually been litigated or ruled upon below. Thus, there was no proper basis whatsoever for the appellate court to reach any ultimate conclusion as to the nature or extent of HP's alleged misconduct and, similarly, no proper basis for Judge Thomas' implicit assumption that Virani's assignment of the statutory fee award (without which Judge Thomas would not have concurred), was in any respect a *valid* assignment.

The decision of the Ninth Circuit has far reaching implications. The consistent thrust of Supreme Court decisions in recent years concerning similar fee-shifting provisions has been to emphasize that the court's assessment of a "reasonable" fee to be paid by the losing defendant is to be a standard lodestar calculation of a reasonable hourly fee times the hours reasonably expended which establishes what the *defendant* is obligated to pay, not what the eligible plaintiff is to pay his or her attorney. Such decisions have time and again reiterated the principle that the fee arrangements between

attorney and client are private contractual arrangements which exist independent of whatever fee award is made by the court.

The Ninth Circuit's decision turns these precepts upside down. The decision holds that under *no condition* can the *qui tam* plaintiff ever directly receive the statutory award. Thus, because the attorney's supposed entitlement is, according to this ruling, grounded in the statute itself rather than in the private fee contract, the attorney's purported statutory right would preempt all private contractual arrangements wherein a different means of compensation was negotiated between the attorney and client. This ruling, moreover, constitutes an abrogation of the State of California's traditional authority over the resolution of fee disputes wherein attorney misconduct is alleged. For these reasons, and those additionally stated below, Petitioner submits that a writ of certiorari be granted.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH SUPREME COURT AUTHORITY CONCERNING FEDERAL FEE-SHIFTING PROVISIONS.

In initially interpreting the pertinent provision the district court relied upon this Court's decisions in *Evans v. Jeff D.*, 475 U.S. 717 (1986); *Venegas v. Mitchell*, 495 U.S. 82 (1990); *Blanchard v. Bergeron*, 489 U.S. 87 (1989); and

Blum v. Stenson, 468 U.S. 886 (1984). (App. 27-34) Similarly, in his concurring opinion Ninth Circuit Judge Thomas stated:

> The *clear import* of case law is that (a) statutory attorneys' fee awards are bestowed upon the party, not the attorney and (2) such awards are separate and distinct from the contractual relationship between attorney and client. Under fee-shifting statutes, a court must determine the reasonable compensation to be paid by the defendant for the time and effort expended by the prevailing party's attorney, 'no more and no less.' *Blanchard v. Bergeron*, 489 U.S. 87, 93, 109 S. Ct. 939, 944, 103 L. Ed.2d 67 (1989). The fee-shifting statute 'controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer.' *Venegas v. Mitchell*, 498 U.S. 82, 90, 110 S. Ct. 1679, 1684, 109 L. Ed.2d 74 (1990). Thus, the fee award *may bear no relation to the actual fee paid by the prevailing party to his or her attorney.* 'What a plaintiff may be bound to pay and what an attorney is free to collect under a fee agreement are not necessarily measured by the "reasonable attorney's fee" that a defendant must pay pursuant to a court order.' *Id.* Consistent with precedent concerning other fee-shifting statutes, I do not believe the False Claims Act interferes with the contractual relations between attorney and client.
>
> (App. 16-17; emphasis added.)

Where even one of the three judges addressing the question on review finds the reasoning of the appellate court to be at variance with applicable Supreme Court authority, the writ for certiorari should be granted.

II. THE NINTH CIRCUIT'S STATUTORY INTERPRETATION IS DIRECTLY CONTRARY TO THE PLAIN LANGUAGE OF THE PROVISION.

The statutory language plainly and unequivocally states that it is the "person" who brought the suit under the FCA's *qui tam* provisions who "shall" receive the fee award, as Judge Thomas noted in his concurring opinion. (App. 16) A plain meaning interpretation of this language is entirely consistent with the authorities which state that federal fee-shifting provisions confer fee awards upon parties, not their counsel (*Evans*, 475 U.S. at 730-732; *Venegas*, 495 U.S. at 87), and with the Ninth Circuit's own prior conclusion in *Willard v. City of Los Angeles*, 803 F.2d 526, 527 (9th Cir. 1986), that an attorney lacks standing to even request a fee award except on behalf of the client.

Under the well-established rules of statutory construction, it is primarily the language of the statute itself which controls. Only where such language is ambiguous should the court employ other tools of construction, such as reference to the legislative history, in determining a statute's meaning.[6] Here, however, Ninth Circuit has not

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[6] As this Court stated in *West Virginia University Hospitals v. Casey*, 495 U.S. 83, 99 (1991), "The best evidence [of congressional purpose] is the statutory text adopted by both houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous – that has a clearly accepted meaning in both legislative and judicial practice – we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process. . . . ('[W]here, as here, the statute's language is plain, "the sole function of the court is to enforce it according to its terms.')." (Citations omitted.)

only ignored the plain language of the provision enacted by Congress, but has concluded that the statute means the exact *opposite* of what it plainly states.

Moreover, had the circuit court looked to the legislative history (which it did not) in construing 31 U.S.C. § 3730(d)(1), it would have found no support for its extraordinary interpretation there, since the legislative record states that the fee-shifting provision enacted in 1986 was intended to provide "that prevailing *qui tam relators* may be awarded reasonable attorneys fees *in addition* to any other percentage award [recovered]."[7] Thus, Congress explicitly described the *relator* as the recipient of the fee award, just as the relator is unquestionably the party entitled to receive the percentage award out of the funds recouped for the Government. The legislative history therefore provides no support whatsoever for the Ninth Circuit's unanticipated and directly contrary construction of the actual language of the statute. Indeed, although the legislative history suggests, by its use of the word "may", a discretionary award, in its final wording as enacted, the award to "the person" was made *mandatory*, such that the court *shall* make such award. The Ninth Circuit's interpretation is thus directly contrary to express congressional intent.

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[7] S. Rep. No. 345, 99th Cong., 2d Sess., p. 29, *reprinted in* U.S. Code Cong. & Admin. News, 5266, 5294.

III. THE LOWER COURT'S DECISION IS IN DEROGATION OF THE STATE'S AUTHORITY OVER FEES AGREEMENTS PERFORMED IN CALIFORNIA AND THE CONDUCT OF ATTORNEYS PRACTICING WITHIN THE STATE.

The distinction between a fee certain versus a contingency fee was delineated by this Court in *Burlington, supra,* 508 U.S. at 560-561. The specific forms in which an attorney and client might negotiate the terms of compensation are, of course, widely variable, ranging from a flat retainer amount, or an hourly fee payable on demand, to a contingency percentage of the client's potential recovery, or even a variable contingency percentage based upon at what stage of the proceedings a recovery is obtained, or indeed some combination of a minimum set fee amount with an additional contingency percentage where specific results are obtained. Obviously, where court awarded fees are added into the equation, the variety of possible contractual arrangements are further multiplied. The rights of both attorney and client to freely enter into whatever payment scheme is mutually acceptable is a right heretofore *protected* by the federal courts' refusal to consider the specific terms of a given fee contract in making the statutory award. The Ninth Circuit's ruling, by contrast, intrudes upon that right.

In addition to the general authority of state law over contracts, however, the authority to regulate the conduct of attorneys licensed to practice within its borders is

likewise traditionally a state law concern.[8] As the Fourth Circuit wrote in a recent decision in which the broad preemptive reach of the Employee Retirement Income Security Act ("ERISA") was at issue:

> A presumption that ERISA does not preempt legal malpractice claims arises because the law governing legal malpractice represents a *traditional exercise of state authority*. [Citations omitted.] Federalism concerns strongly counsel against imputing to Congress an intent to displace 'a whole panoply of state law in this area' absent some clearly expressed direction.
>
> *Custer v. Sweeney*, 89 F.3d 1156, 1167 (4th Cir. 1996); emphasis added.

By holding that "[u]nder no condition" (App. 11) is a relator entitled to directly receive the statutory fee award, such that in all circumstances the attorney *must* receive that sum, the Ninth Circuit in effect has rewritten any and all private fee agreements which are not already premised upon an outright assignment of statutory fees. Considering the wide variety of fee arrangements which might otherwise be freely negotiated between attorney

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[8] Local Rule 2.5.7 of the United States District Court, Central District of California requires all counsel to become familiar with and to comply with the standards of professional conduct required of members of the State Bar of California and contained in the state Bar Act, the Rules of Professional Conduct of the State Bar of California, and the decisions of any court applicable thereto. The rule further states, "Those statutes, rules and decisions are hereby adopted as the standards of professional conduct of this Court."

and client under California's statutes, this ruling represents a severe intrusion into the private right of contract.[9]

Furthermore, the appellate court's ruling seriously impinges upon the state's authority to regulate the conduct of attorneys. By explicitly holding that it is the attorney, not the client, who has an actual interest in the fee award, while holding that the client's "interest" is actually no more than a "power" to realize an award for the financial benefit of his counsel, the Ninth Circuit has in effect granted such counsel a direct interest in the litigation. Not only is this result contrary to applicable professional rules of conduct, it is, moreover, directly contrary to a long-established line of California authority which expressly holds that an attorney, merely by virtue of his or her fee agreement, does not acquire a "power coupled with an interest" in the subject matter of the suit. See, e.g., *Wright v. Security-First Nat'l Bank of Los Angeles*, 13 Cal.2d 139, 141-142, 88 P.2d 125, 126 (1939).

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[9] Indeed, the Ninth Circuit's ruling has quite literally destroyed the rights of those individual and corporate litigants whose financial means enabled them to pay hourly fees up front throughout the litigation, and who did so with the settled expectation that they would ultimately be reimbursed through the statutory award. Despite the fact that explicit Supreme Court authority holds that it is the litigant, whether impecunious or financially well off, who is entitled to the fee award, (*Blanchard, supra*, 489 U.S. at 94-95; *Venegas, supra*, 495 U.S. at 87-88), now those litigants who have conscientiously paid their legal fees as they were incurred have been advised by the Ninth Circuit that under *no* condition are they entitled to receive any part of the statutory award and are now, therefore, cut off from their anticipated means of reimbursement.

Nor does this decision comport with established state law procedures and substantive law concerning the resolution of fee disputes. The circuit court stated that the "district court erred when it decided that the fees must be paid to Virani himself and left it up to HP to see if it could recover the fees from him." (App. 11) The Supreme Court of California, however, has unequivocally stated that the "burden of showing that his dealings with his client in all respects were fair" rests upon counsel. *Clark v. Millsap*, 197 Cal. 765, 785 (1926). Where a dispute over fees arises, under California law the attorney is *required* to file a notice of lien and pursue his remedies in a *separate* proceeding. See, *Bandy v. Mt. Diablo Unified School District*, 56 Cal. App.3d 230, 234, 126 Cal. Rptr. 890, 893 (1976). Indeed, as even the Ninth Circuit necessarily acknowledged, "one of the methods by which the issue of attorney's conflict of interest may be raised is as a *defense* in the *attorney's action to recover fees.*" (App. 13; citing to *Asbestos Claims Facility v. Berry & Berry*, 219 Cal. App.3d 9, 26-27, 267 Cal. Rptr. 896, 906-07 (1990); emphasis added.) Thus, the award of fees to Virani was the eminently correct result in light of the plain language of the federal statute, and to "leave it to HP" to thereafter sue in state court to recover its appropriate compensation, if any, was not error, but was the precise procedure dictated by state law.[10]

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[10] Note that HP could have, at any time during the pendency of the fee dispute in the federal district court, perfected its rights under state law merely by filing the required notice of lien. HP was therefore not bereft of remedies, as the circuit court appeared to assume. HP simply chose not to avail itself of the readily available state law remedies which were clearly at its disposal.

A federal court sitting in a state is *required* to enforce that state's laws concerning the creation of attorney's liens. See, *Central Railroad & Bkg. Co. v. Pettus*, 113 U.S. 117, 127 (1885). See, also, *Democratic Cent. Com. v. Metro Area Transit Com'n*, 941 F.2d 1217, 1219 (D.C. Cir. 1991), "The existence and effect of an attorney's lien is governed by the law of the place in which the contract between the attorney and client is to be performed. 7 Am. Jur.2d *Attorneys at Law* § 351, at 354 (1980)." Consequently, directing HP to pursue its remedies in a separate proceeding was in accordance both with state law and federal regard for the state's traditional authority in this area, while the Ninth Circuit's ruling was in derogation of both. The requested writ is necessary to address this significant encroachment upon traditional state authority.

IV. THE NINTH CIRCUIT'S RULING IS AT ODDS WITH THE DECISIONS OF OTHER CIRCUITS.

The circuit court's construction of the fee provision is, as noted above, contrary to Supreme Court authority. It is also, therefore, necessarily at odds with the decisions of its sister circuits construing similar provisions which have properly followed Supreme Court precedent. A string of citations to various circuit court decisions is unnecessary to illustrate this point. The blunt language of but one recent Seventh Circuit case will suffice.

In *Central States, Southeast and Southwest Area Pension Fund v. Central Cartage Co.*, 76 F.3d 114 (7th Cir. 1996), the losing party protested that the fee award should be limited to the Fund's out-of-pocket expenses since it had been represented by in-house staff counsel, such that a

full award would constitute "fee-splitting" with non-lawyers. The Seventh Circuit gave short shrift to that contention and, in reliance upon, *inter alia*, *Venegas* and *Evans*, stated:

> The money is not the lawyer's to start with. A *contract* between lawyer and client may call for a particular distribution, may even *assign* the award to the lawyer, but how the litigant allocates the money between its legal budget and other endeavors is none of the court's business (provided it keeps its contracts). It is similarly irrelevant whether the award is based on a fee-shifting statute . . . or a penalty provision such as Fed. R. Civ. P. 11; *the litigant owns the award* in either case, which overcomes all fee-splitting objections.
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> *Central States*, 76 F.3d at 116; emphasis added.

Such a common sense approach, supported by the plain language of the pertinent statute, by this Court's prior decisions, and which frankly acknowledges that the attorney's rights are grounded in the *contract*, not the statute itself, stands out in sharp contrast to the Ninth Circuit's esoteric "powers" analysis construing the applicable statute to mean exactly the opposite of what it plainly states.

The decision below is, moreover, at odds with the Sixth Circuit's approach in *United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032 (6th Cir. 1994). In that case, the Sixth Circuit, acting under its inherent supervisory power, at least directed a remand in order to allow the district court to conduct a thorough evidentiary inquiry into the claimed improprieties affecting HP's tangled relationship with TAF and its individual

client in that action. Here, however, the Ninth Circuit purported to make a determination, based on "the facts of this case" (App. 12) that no conflict of interest, but only a "taint of some impropriety" (App. 14) was present. Yet the district court never *addressed* the facts involved in Virani's allegations of attorney misconduct. Thus, the appellate court made its determination in a vacuum in which none of the relevant facts had ever been adjudicated.

The ultimate result of the Ninth Circuit's total circumvention of the ethical issues is that counsel in False Claims Act cases in the courts of the Sixth Circuit are now on notice that a searching review of their fee arrangements will be undertaken when questions of ethical improprieties arise, but in the Ninth Circuit such counsel are free to breach their fiduciary duties and operate in conflict of interest with their clients, secure in the knowledge that no comparable inquiry will affect their "right" to *directly* receive the full statutory award. Such a variance between the Sixth and the Ninth Circuit approach to such fundamental concerns of professional responsibility requires the review of this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES of America ex rel. Alnoor VIRANI, Plaintiff-Appellee,
v.
JERRY M. LEWIS TRUCK PARTS & EQUIPMENT, INC.; Steven Lewis; Robert Holtzman, Defendants,
and
Hall & Phillips, Appellants.
UNITED STATES of America ex rel. Alnoor VIRANI, Plaintiff-Appellee,
v.
Steven H. LEWIS; Jerry M. Lewis Truck Parts & Equipment,
Inc.; Robert Holtzman, Defendants-Appellants.

Nos. 95-56396, 95-56456.
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted June 3, 1996.
Decided July 10, 1996.

In *qui tam* action brought under False Claims Act, the United States District Court for the Central District of California, William Duffy Keller, J., required defendant to pay statutory attorney fees to qui tam relator, rather than directly to law firm that represented relator, and denied defendant's request to reconsider amount of fee. Cross-appeals were taken. The Court of Appeals, Fernandez, Circuit Judge, held that: (1) client's request of attorney fees created right in attorney to receive fee, and (2) any impropriety in fee arrangement between attorney and client did not affect amount defendant was obligated to pay.

Reversed and remanded in part and affirmed in part.

Thomas, Circuit Judge, filed concurring opinion.

Phillip R. Benson, Newport Beach, California, for plaintiff-appellee.

Fred D. Heather, Troop, Meisinger, Steuber & Pasich, LLP, Los Angeles, California, and Susan B. Myers, McKenna & Cuneo, LLP, Los Angeles, California, for defendants Jerry M. Lewis Truck Parts & Equipment, Inc., and Steven H. Lewis.

Appeals from the United States District Court for the Central District of California, William D. Keller, District Judge, Presiding. D.C. No. CV-89-01302-WDK-Ex.

Before: FARRIS, FERNANDEZ, and THOMAS, Circuit Judges.

FERNANDEZ, Circuit Judge:

The law firm of Hall & Phillips (HP) appeals the district court's order which required Jerry M. Lewis Truck Parts & Equipment, Inc. (Lewis), the defendant in a *qui tam* suit, to pay statutory attorneys' fees to Alnoor Virani, the *qui tam* relator, rather than directly to HP. The law firm was Virani's attorney in the *qui tam* action. At the same time, Lewis appeals the district court's refusal to reconsider the amount of the attorneys' fees award because Lewis contends that improper fee arrangements made the attorneys' fees unreasonable. We reverse the district court's order that the attorneys' fees be paid directly to the *qui tam* relator rather than directly to the attorneys, but we affirm the district court's denial of Lewis's motion for reconsideration.

STATEMENT OF THE CASE

In February 1989, Virani retained HP to represent him in a *qui tam* action against Lewis under the False Claims Act (FCA). 31 U.S.C. Secs. 3729-3732. The retainer agreement provided that Virani would not pay HP for legal services in connection with the Lewis litigation. The agreement, however, did reserve HP's right to seek court-awarded costs, expenses, and attorneys' fees from Lewis. The agreement further assigned to HP all monetary amounts awarded as costs, expenses or attorneys' fees and provided that HP would have the "ultimate authority concerning the conduct of this litigation, including decisions such as whether to continue to prosecute the case and the terms of any settlement."

On the same day, Virani also entered into an agreement with the Taxpayers Against Fraud (TAF). That agreement bound the parties to act as co-plaintiffs in the Lewis case. TAF agreed to pay the litigation expenses while Virani promised that TAF would receive 40% of any recovery awarded by the court. The agreement further provided that any percentage of the recovery that TAF adjudged to be necessary to pay to counsel would come exclusively out of TAF's share. Some months earlier, in September 1988, TAF had entered into an agreement with HP whereby TAF agreed to pay HP two-thirds of its hourly rate in addition to half of any damages received by TAF in FCA cases. HP had agreed to represent TAF in several FCA cases already in progress and in future FCA cases. Virani claims to have had no knowledge of the agreement between TAF and HP.

In December of 1990, TAF withdrew from this litigation, but before it withdrew it entered into a second agreement with Virani which reaffirmed Virani's obligation to pay 40% of any award to it. In May 1992, TAF entered into a second agreement with HP which superceded the September 1988 agreement. TAF agreed to pay at least a 50% contingency fee in each of TAF's FCA cases. However, the parties also agreed that specific arrangements could be made for any particular lawsuit, and TAF agreed to pay a two-thirds contingency fee in the Lewis litigation.

Virani and Lewis settled the underlying *qui tam* action, and the court awarded $316,500 in statutory attorneys' fees. During the attorneys' fee litigation, Lewis discovered the arrangements between Virani, HP, and TAF. Lewis asserted that because the fee arrangements were "fraudulent and unconscionable," the statutory attorneys' fee should be lowered. The district court, however, adopted the Report and Recommendation of the Magistrate Judge and rejected Lewis's argument.

After the court awarded the statutory fees, Virani claimed that he was entitled to personally receive the fees because he was unaware of the arrangement between HP and TAF. The district court agreed. It concluded that Virani was entitled to collect the fees himself and determined that it had not retained jurisdiction to determine how the fee ought to be allocated under the fee agreements between HP and Virani. In effect, it allowed Virani to keep the fees, unless HP could successfully obtain them from him in another action.

JURISDICTION AND STANDARDS OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. Sec. 1331 and 31 U.S.C. Sec. 3732(a). We have jurisdiction pursuant to 28 U.S.C. Sec. 1291.

"We generally review fee awards for an abuse of discretion." Haworth v. Nevada, 56 F.3d 1048, 1051 (9th Cir.1995); Franklin Fin. v. Resolution Trust Corp., 53 F.3d 268, 273 (9th Cir.1995). However, we review the supporting findings of fact for clear error, but review whether the district court applied the correct legal standard de novo. Price v. Seydel, 961 F.2d 1470, 1475 (9th Cir.1992); *see also* Parents of Student W v. Puyallup School Dist., No. 3, 31 F.3d 1489, 1498 (9th Cir.1994). Also, we review any element of statutory interpretation involved in the district court's decision de novo. *See* Haworth, 56 F.3d at 1051. We review a district court's determination that it lacks subject matter jurisdiction de novo. *See* Seven Resorts, Inc. v. Cantlen, 57 F.3d 771, 772 (9th Cir.1995); Sopcak v. Northern Mountain Helicopter Serv., 52 F.3d 817, 818 (9th Cir.1995).

DISCUSSION

A. *Entitlement to Receipt of Fees.*

The relationships between Virani, HP, and TAF have generated an issue that courts are rarely required to focus upon. As do many other statutes, the False Claims Act provides for an award of fees to successful plaintiffs. It states, in pertinent part: "Any such person shall also receive an amount of reasonable expenses which the court finds to have been necessarily incurred, plus

reasonable attorneys' fees and costs." 31 U.S.C. Sec. 3730(d)(1). On its face this seems to say that the plaintiff can recover the attorneys' fee for himself. What then of the attorney? Are not the fees for his services and should not he, if anyone, receive them? It is usually assumed that the answer to the latter question is "Yes, of course, how could it be otherwise." That assumption simply tends to be in the background of decision making about fees. "Yet there are times when someone will ask that a usually unacknowledged part of the background be brought to the forefront and perused before it recedes again into relative obscurity." Larson v. Neimi, 9 F.3d 1397, 1402 (9th Cir.1993). This is one of those cases.

What makes the issue most interesting is that at first blush it appears to present us with a conundrum: if the attorney is entitled to the fee, how can it be that he has no right to ask for it, and if the client has the right to ask for it, how can it be that he has no right to keep it? The answer was suggested by Hohfeld, for as he said, "the term 'rights' tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense; and this looseness of language is occasionally recognized by the authorities." Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16, 30 (1913). So it is here. The client's right is really a power to obtain fees for his attorney; the attorneys' right does not come into being until the client exercises that power; the defendant's liability will only arise if that power is exercised. But we are a little ahead of ourselves and will now outline the authorities which appear to create the conundrum in the first place.

The Supreme Court has made it clear that, in general, statutes bestow fees upon parties, not upon attorneys. Evans v. Jeff D., 475 U.S. 717, 731-33, 106 S.Ct. 1531, 1539-40, 89 L.Ed.2d 747 (1986). Those fees can, therefore, be waived by the party himself. Id. As the Court has said, "just as we have recognized that it is the party's entitlement to receive the fees in the appropriate case, so have we recognized that as far as [42 U.S.C. Sec. 1988] is concerned, it is the party's right to waive, settle, or negotiate that eligibility." Venegas v. Mitchell, 495 U.S. 82, 88, 110 S.Ct. 1679, 1683, 109 L.Ed.2d 74 (1990). Thus, the attorney remains at the mercy of the client, who can either demand attorneys' fees from the defendant, or not, as he chooses. If the client chooses not to ask for the fees, the attorney has no standing to request them. *See* Willard v. City of Los Angeles, 803 F.2d 526, 527 (9th Cir.1986); *see also* Freeman v. B & B Assocs., 790 F.2d 145, 149 (D.C.Cir.1986). Of course, the attorney cannot then look to the defendant for payment.

On the other hand, weighty authority demonstrates that the client himself is not entitled to keep the fees which are measured by and paid on account of the attorneys' services. The plaintiff cannot collect fees at all unless there is a true attorney-client relationship. That is even true when the plaintiff *is* an attorney. Kay v. Ehrler, 499 U.S. 432, 435-437, 111 S.Ct. 1435, 1437, 113 L.Ed.2d 486 (1991). The mere fact that the attorneys' labor, even reasonable and skilled labor, is expended on the cause does not entitle the plaintiff-attorney to a fee. Id. at 437-38, 111 S.Ct. at 1438. The plaintiff has no power to confer the fee upon himself.

On the other side of the coin is the litigating organization, which, in a sense, may represent itself by the use of in-house counsel. It is separate from its attorneys, and it does have the power to obtain attorneys' fees for their services. Id. at 436 n. 7, 111 S.Ct. at 1437 n. 7. And when an individual is represented by a litigating organization, we have declared that "the award should be made directly to the organization providing the services to ensure against a windfall to the litigant." Brandenburger v. Thompson, 494 F.2d 885, 889 (9th Cir.1974). Litigating organizations are, in that sense, the providers of the legal services. *See* id. They "stand[ ] in the same position as a private attorney to whom a fee is owed." Hairston v. R & R Apartments, 510 F.2d 1090, 1093 (7th Cir.1975). Thus, "fee awards must accrue to counsel." Rodriguez v. Taylor, 569 F.2d 1231, 1245 (3d Cir.1977), *cert. denied*, 436 U.S. 913, 98 S.Ct. 2254, 56 L.Ed.2d 414 (1978). And "the grant of fees should go directly to the organization providing the services." Hairston, 510 F.2d at 1093. *Cf.* Serrano v. Priest, 20 Cal.3d 25, 47 n. 21, 569 P.2d 1303, 1315 n. 21, 141 Cal.Rptr. 315, 327 n. 21 (1977) (award of fees directly to attorneys "no longer questioned in federal courts").

All of this means that even if an attorney is willing to agree to work on a case for less than a reasonable fee, he will be entitled to a reasonable fee when the client asks that the fee be awarded out of the defendant's pocket. *See* Quesada v. Thomason, 850 F.2d 537, 543 (9th Cir.1988). That creates no windfall for the attorney because he will merely receive "a reasonable hourly fee for all hours reasonably spent." Id. And it creates no windfall for clients because "statutory awards in excess of private fee

agreements . . . should be used to compensate the attorney in full." Id.; *see also* Phillips v. General Servs. Admin., 924 F.2d 1577, 1582-83 (Fed.Cir.1991) (to be incurred there must be agreement that the fee will be paid over to attorney).

These concepts were tested in a truth-in-lending case where the statute provided that a creditor who did not make proper disclosure was liable to the wronged person in an amount equal to, among other sums, " 'a reasonable attorney's fee. . . . ' " Plant v. Blazer Fin. Servs., Inc., 598 F.2d 1357, 1365 (5th Cir.1979). The losing creditor claimed a right to set off the amount that it was owed by the plaintiff against the attorneys' fee that was awarded to the plaintiff. The court did not agree. It was not moved by the argument that the fee was "nominally" awarded to the plaintiff. As it held, "the fee once awarded becomes in effect an asset of the attorney, not the client." Id. at 1366; *see also* Freeman, 790 F.2d at 150. In other words, the fee is for the attorney and the attorney should receive it.

In the *qui tam* arena, it is even more clear that attorneys' fees must go to the attorneys rather than to the plaintiff. If they did not, a wrong would be perpetrated upon the government. *See United States ex* rel. Gibeault v. Texas Instruments Corp., 25 F.3d 725 (9th Cir.1994). If the amount went to the plaintiff, it would be a compensatory payment which really belongs to the United States subject to allocation of a portion to the plaintiff. Id. at 728. As we have said:

> [T]he government claims the $300,000 payment for attorneys' fees is really a settlement under the False Claims Act that is structured as attorneys' fees. Such an allocation of the settlement

> proceeds would contravene the requirements of Sec. 3730(d)(2), which guarantees the government a substantial portion of any False Claims Act settlement.
>
> . . . .
>
> . . . Thus, the government has a genuine concern as to whether the amount labelled attorneys' fees actually represents in part a payment to the *qui tam* plaintiff.
>
> Id.

With the above, the statement of the riddle is complete. How can it be that the one who may be entitled to actually receive any fee has no right to ask for it, but the one who has the right to ask for the fee is not entitled to actually receive it? Again, the answer is found in the characterization of the plaintiff's right as a power. "To have a power is to have the ability to make another person have or cease to have rights of one kind or another." Judith Jarvis Thomson, *The Realm of Rights* 59 (1990); *see also* Hohfeld, 23 Yale L.J. at 44-49. We are all familiar with powers of appointment where the holder can direct that assets be paid from "A" (usually a trust fund) to "B." Until that power is exercised, "B" has no right to the assets, and "A" has no duty to give them to him.

Similarly, in this area only the plaintiff has the power to demand that the defendant pay the fees of the plaintiff's attorney.[1] Unless and until the plaintiff exercises that power, no one has the right to collect fees from the

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[1] Of course, we recognize that it is not quite that simple. The court must make the order, and the defendant can contest it. Yet, the principle remains the same.

defendant, and the defendant has no duty to pay them. Once the power is exercised, however, the attorneys' right vests, and the defendant's duty becomes fixed. *Compare* Phillips, 924 F.2d at 1583 (no fee is "incurred" for fee award purposes unless there is an express or implied agreement that they will be paid to the attorney). The work was done by and the fees are for the plaintiff's attorney. They must be directed to the attorney. Were the rule otherwise, plaintiffs would obtain possession of fee awards, and attorneys would be left to attempt to obtain the money paid for their services as best they could. Left to the normal vicissitudes of life, substantial sums would be diverted from their intended purpose. Actions of the client or of the client's creditors (or heirs) would often intervene. That would not only thwart the Congressional purpose but would also make no sense at all and would lead to unconscionable results.

This case is determined by a straightforward application of these principles. Virani paid no fees to HP, but he did exercise his power to request that fees be paid in an amount calculated on the value of HP's labor. The district court awarded those fees, and HP acquired the right to receive them from Lewis. The district court erred when it decided that the fees must be paid to Virani himself and left it up to HP to see if it could recover the fees from him. Under no condition was Virani entitled to receive direct payment of those fees from Lewis. If HP did not earn them, Lewis should not have to pay them at all; if HP did earn them, Lewis must pay them to HP.[2] That brings us to Lewis's claims.

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[2] We do not opine on any other disputes which Virani might have with HP or TAF.

B. *Reasonableness of Fees.*

Lewis asserts that HP did not treat Virani ethically, so the fees it was ordered to pay cannot have been reasonable. The district court did not address the issue. It failed to do so because it was of the opinion that fee disputes were entirely between the attorney and the client and had nothing at all to do with the defendant. That determination was the almost inevitable result of the district court's decision that the plaintiff can personally receive the fee and can then attempt to keep it for himself. In that the district court erred because the statute only requires Lewis to pay a reasonable attorneys' fee, and the question here must be: What *is* a reasonable attorneys' fee?

Lewis contends that California law provides that the attorney cannot recover anything at all if an ethical violation is shown. It is possible that some aspects of the fee arrangements between Virani and HP were not entirely proper. *See* United States ex rel. Taxpayers Against Fraud v. General Elec. Co., 41 F.3d 1032, 1043-49 (6th Cir.1994). We express no opinion on that head. However, under the facts of this case Lewis's assertions are not supported by California law. Thus, the district court reached the correct result when it refused to revisit its determination that the fee awarded for services rendered in the *qui tam* action was reasonable.

California courts have often held that when the ethical violation in question is a conflict of interest between the attorney and the client (or between the attorney and a former client), the appropriate fee for the attorney is zero. At least that is true when the violation is one that pervades the whole relationship. *See, e.g.*, Clark v. Millsap,

197 Cal. 765, 785, 242 P. 918, 926 (1926) (relationship permeated with fraud after gaining control of client's assets; no attorneys' fee proper); Day v. Rosenthal, 170 Cal.App.3d 1125, 1162, 217 Cal.Rptr. 89, 113 (1985) (no finding on reasonable value of attorneys' services necessary because conflict of interest rendered services valueless), *cert. denied*, 475 U.S. 1048, 106 S.Ct. 1267, 89 L.Ed.2d 576 (1986); Jeffry v. Pounds, 67 Cal.App.3d 6, 12, 136 Cal.Rptr. 373, 377 (1977) (law firm entitled to compensation only for services it rendered prior to its breach of professional conduct by accepting representation of client's wife in marital dispute without the client's consent); Goldstein v. Lees, 46 Cal.App.3d 614, 617-18, 120 Cal.Rptr. 253, 254-55 (1975) (attorney who undertook to represent a client in a proxy fight with a corporation for which the attorney had been general counsel could not recover any fees); Conservatorship of Chilton, 8 Cal.App.3d 34, 43, 86 Cal.Rptr. 860, 866 (1970) (in case of a clear conflict of interest, there was no error when the trial court found no value in the services rendered); *see also* Asbestos Claims Facility v. Berry & Berry, 219 Cal.App.3d 9, 26-27, 267 Cal.Rptr. 896, 906-07 (1990) (one of the methods by which the issue of attorney's conflict of interest may be raised is as a defense in the attorney's action to recover fees).

However, there is no hint in this case that there was any conflict of interest whatever. Nor was there any suggestion that HP did not perform valuable services for Virani or that anything is amiss in the calculation of the reasonable amount of fees for those services. The objection made here is that in the formation of the attorney-client relationship HP arranged matters in a way which

could ultimately bring it more than a reasonable fee. It is also argued that Virani did not know that. We do not explore those issues because they come to no more than an assertion that HP handled its fee arrangement in a way that might have the taint of some impropriety. When that kind of claim has been made, California courts have not denied fees in their entirety. They have simply refused to enforce the improper agreement itself. Nevertheless, attorneys were still allowed to recover the reasonable value of their services. *See, e.g.*, Calvert v. Stoner, 33 Cal.2d 97, 105, 199 P.2d 297, 301 (1948) (*quantum meruit* allowed even if fee arrangement were void as violative of public policy); Rosenberg v. Lawrence, 10 Cal.2d 590, 594, 75 P.2d 1082, 1084 (assuming the express contract for fees was void because of attorney misconduct in splitting the fee with a non-attorney *quantum meruit* allowed); *cf.* Fracasse v. Brent, 6 Cal.3d 784, 791, 494 P.2d 9, 13, 100 Cal.Rptr. 385, 389 (1972) (attorney entitled to payment for reasonable value of services rendered before his discharge by client, despite written fee contract); Ayres v. Lipschutz, 68 Cal.App. 134, 138, 228 P. 720, 720-21 (1924) (same).

In light of California law, even if there were some impropriety in the fee arrangement between HP and Virani, Lewis cannot prevail. HP would still be entitled to recover the reasonable value of its services, and that is all Lewis has been required to pay. We appreciate Lewis's concern that Virani be treated fairly when attorneys enter into fee arrangements with him, but, again, that does not affect the amount of the fee which it must pay.

CONCLUSION

HP rendered valuable services in a *qui tam* action against Lewis, and the court awarded a reasonable attorneys' fee for those services. After Virani exercised his power to have the fee assessed against Lewis, he decided that he would like to receive the fee himself. He cannot; the fee must go to HP. Lewis would like to ward off its duty to pay the fee by taking advantage of the falling out between Virani and HP. It cannot; the fee must go to HP. In fine, Virani's exercise of his power has created a right in HP to receive the fee and a corresponding duty in Lewis to pay it.

REVERSED and REMANDED, with directions to enter judgment directing payment of the fee to HP (No. 95-56396). AFFIRMED (No. 95-56456).

THOMAS, Circuit Judge, concurring.

I concur with the result in this case, but differ slightly from the majority's statutory interpretation. The majority holds that the False Claims Act requires payment of court-awarded attorneys' fees directly to the attorney. I would hold that, absent a contractual assignment to the attorney, the False Claims Act requires payment of the attorneys' fee award to the party, with the ultimate disposition of the award dependent upon the contract between the attorney and client. Here, I have absolutely no conflict with the result because Virani assigned his right to court-awarded attorneys' fees to his lawyers.

However, a brief comment on the statutory analysis is warranted. On its face, the False Claims Act provides that payment of attorneys' fees should be made directly

to the qui tam plaintiff. Referring to the qui tam plaintiff, 31 U.S.C. Sec. 3730(d)(1) provides:

> Any such *person* shall also *receive* an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs.
>
> (emphasis added).

This result is consistent with the general proposition, noted by the majority, that federal fee-shifting statutes confer fee awards upon parties, not attorneys. Evans v. Jeff D., 475 U.S. 717, 730-32, 106 S.Ct. 1531, 1539-40, 89 L.Ed.2d 747 (1986). A party may waive statutorily authorized fees over the objection of his or her attorney. Id. Indeed, an attorney does not have standing to request statutory fees. Willard v. City of Los Angeles, 803 F.2d 526, 527 (9th Cir.1986).

The majority interprets this to mean that a client has a discretionary power to obtain a fee award. In the case of fee-shifting statutes, the majority concludes that if that power is exercised, the fee award must be paid directly to the attorney. The implication seems to be that the attorney has a vested right in the fee award and the client acts only as a vehicle through which the attorney may obtain a court-awarded fee.

In my opinion, this interpretation does not square with a plain reading of the False Claims Act, nor with general case law concerning federal fee-shifting statutes. The clear import of case law is that (1) statutory attorneys' fee awards are bestowed upon the party, not the attorney and (2) such awards are separate and distinct from the contractual relationship between the attorney

and client.[1] Under fee-shifting statutes, a court must determine the reasonable compensation to be paid by the defendant for the time and effort expended by the prevailing party's attorney, "no more and no less." Blanchard v. Bergeron, 489 U.S. 87, 93, 109 S.Ct. 939, 944, 103 L.Ed.2d 67 (1989). The fee-shifting statute "controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer." Venegas v. Mitchell, 495 U.S. 82, 90, 110 S.Ct. 1679, 1684, 109 L.Ed.2d 74 (1990). Thus, the fee award may bear no relation to the actual fee paid by the prevailing party to his or her attorney. "What a plaintiff may be bound to pay and what an attorney is free to collect under a fee agreement are not necessarily measured by the 'reasonable attorney's fee' that a defendant must pay pursuant to a court order." Id. Consistent with precedent concerning other fee-shifting statutes, I do not believe the False Claims Act interferes with the contractual relations between attorney and client. Id. at 87, 110 S.Ct. at 1682-83 ("We have never held that Sec. 1988 constrains the freedom of the civil rights plaintiff to become contractually and personally bound to pay an attorney a percentage of the recovery, if any, even though such a fee is larger than the statutory fee that the defendant must pay to the plaintiff.").

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[1] Of course, fees must be "incurred" in order for the plaintiff to be eligible for compensation. In order to be "incurred" within the meaning of a fee-shifting statute, there must be an express or implied agreement that fees will be paid to a legal representative. Phillips v. General Services Admin., 924 F.2d 1577, 1582-83 (Fed.Cir.1991). Thus, a pro se plaintiff is not entitled to a fee award. Kay v. Ehrler, 499 U.S. 432, 435-37, 111 S.Ct. 1435, 1436-38, 113 L.Ed.2d 486 (1991).

The analogy to the law of powers is consistent with this conclusion. A power over property is defined as a liberty or authority reserved by, or limited to, a person to dispose of real or personal property for his or her own benefit or the benefit of others. Henderson v. Rogan, 159 F.2d 855, 857 (9th Cir.), *cert. denied*, 331 U.S. 843, 67 S.Ct. 1534, 91 L.Ed. 1864 (1947). A power is "general" if it is capable of being exercised in favor of anyone, including the holder. A power is "special" if its exercise is restricted by the creating document to a designated class of persons other than the holder of the power. *See* Paxton v. Commissioner of Internal Revenue, 520 F.2d 923, 927-28 (9th Cir.), *cert. denied*, 423 U.S. 1016, 96 S.Ct. 450, 46 L.Ed.2d 388 (1975) (discussing powers of appointment); Shedd v. Commissioner of Internal Revenue, 237 F.2d 345, 349 (9th Cir.), *cert. denied*, 352 U.S. 1024, 77 S.Ct. 590, 1 L.Ed.2d 596 (1957) (same). The majority seems to analogize the False Claims Act fee provisions to the creation of a special power. Because the governing fee agreement in this case contains restrictions, I agree. However, the majority implies that this theory ought to apply in every case regardless of the provisions of the attorney-client contract. In my view, the more appropriate analogy is to that of a general power which would give the client control over the property unless restricted by contract. This reasoning is consistent with the False Claims Act and general case law concerning federal fee-shifting statutes.

With this difference noted, I concur.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 89-1302-WDK **Date** August 25, 1995

Title UNITED STATES OF AMERICA, *ex rel.* ALNOOR VIRANI v. JERRY M. LEWIS TRUCK PARTS & EQUIPMENT, INC. *et al.*

DOCKET ENTRY

PRESENT:

HON. WILLIAM D. KELLER, **JUDGE**

Sara Tse	None Present
Deputy Clerk	Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None Present	None Present

PROCEEDINGS:

Before the Court is a Motion for Order Setting a Status Conference or Briefing Schedule in Connection with the Court's Order Awarding Statutory Attorney's Fees and Request for Leave to File a Request for Sanctions. In the underlying *qui tam* action, settled by the parties over two years ago, the Court awarded $316,500 in statutory attorneys' fees. (Order Adopting Findings and Recommendations of United States Magistrate Judge, dated July 23, 1993). Since that time, a dispute has arisen between plaintiff Alnoor Virani and his former counsel, Hall & Phillips, regarding the distribution of the underlying settlement and the statutory attorneys' fees.

FACTUAL BACKGROUND

In February of 1989, Alnoor Virani retained the law firm of Hall & Phillips to represent him in a *qui tam* action against defendants Jerry M. Lewis Truck Parts & Equipment, Inc., Steven Lewis, and Robert Holtzman ("Lewis"). Among other things, the retainer agreement between Virani and Hall & Phillips provided as follows:

> It is understood that no professional fees, costs or expenses will be charged by the attorneys for the services rendered to the client [in connection with the Lewis litigation]. It is understood, however, that the attorneys reserve the right to seek a court award of costs, expenses and attorneys' fees from the opposing parties that is separate and apart from any percentage claim the client may be entitled to from the recovery to the United States Treasury. The client hereby assigns the attorneys any amounts for costs, expenses, and attorneys' fees for work on the case awarded by the court or agreed to by the parties. Under no circumstances will the client oppose, or assist in opposing, any such request for attorneys' fees made by the attorneys nor will he contest or dispute the amount of fees requested thereby.

(*See* Benson Decl., Exhibit C). Under the retainer agreement, Virani also waived his rights with respect to control over the litigation, including the right to accept or reject any settlement agreement. Ultimate control over the lawsuit, including settlement, was left to Hall & Phillips. *Id.*

At the same time, Mr. Virani entered into an agreement with Taxpayers Against Fraud ("TAF"),[1] pursuant to which Virani and TAF would act as co-plaintiffs in the Lewis case. (*See* Benson Decl., Exhibit B). In return for TAF's agreement to advance litigation expenses, Virani agreed to give TAF 40% of any recovery awarded to Virani by the Court. Virani would retain the remaining 60%. *Id.* In addition, the agreement between TAF and Virani provided that

> If in the judgment of TAF it becomes necessary to relinquish a percentage of the recovery allocated to TAF to counsel in order to provide the most effective representation in the case, it is understood that any such percentage shall be taken exclusively from that share provided to TAF. So long as the percentage to counsel comes from TAF's share of the recovery, it shall not be necessary for Virani to separately approve whatever arrangements are necessary to secure the services of qualified counsel.

Id.

However, in September of 1988, months before Virani retained Hall & Phillips, TAF and Hall & Phillips had entered into an agreement in which Hall & Phillips agreed to represent TAF in connection with several False Claims Act cases already being litigated, as well as future cases. (*See* Benson Decl., Exhibit A). TAF agreed to pay Hall & Phillips 66$^2/_3$% of its hourly rate, and also agreed

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[1] TAF is a non-profit organization "dedicated to combating fraud against the federal government," primarily through the use of *qui tam* actions under the False Claims Act. (Budetti Decl., ¶ 2).

to pay Hall & Phillips a contingency fee of 50% of any damages received by TAF in False Claims Act cases. *Id.* Mr. Virani claims to have had no knowledge of the agreement between TAF and Hall & Phillips. (Virani Decl., ¶ 12).

In the course of litigation over the plaintiffs' statutory attorneys' fees, TAF withdrew as co-plaintiff. The attorneys and co-plaintiff were apparently concerned about a recent district court opinion holding that TAF did not have standing in a False Claims Act case. *See United States ex rel. Taxpayers Against Fraud v. Rockwell International Corp.*, 730 F.Supp. 1031 (D.Colo. 1990). Although it disagreed with the *Rockwell* court's holding, TAF withdrew in order to avoid litigating the issue in this Court.[2] However, before it withdrew, TAF entered into yet another agreement with Virani, essentially reaffirming Virani's duty to pay TAF 40% of his share of the recovery. (Benson Decl., Exhibit D).

In May of 1992, Hall & Phillips entered into another agreement with TAF. This contract, which superseded the 1988 agreement, provided that Hall & Phillips would receive at least a 50% contingency fee in each of TAF's False Claims Act cases. (Benson Decl., Exhibit E). However, the parties further agreed that a specific contingency fee could be agreed upon by the parties in connection with any particular lawsuit. *Id.* For the Lewis lawsuit, TAF agreed to pay Hall & Phillips two thirds of TAF's share of any recovery. (*Id.*, Exhibit F). This contract

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[2] Mr. Virani claims that the real reason for the withdrawal was to avoid discovery requests served by Lewis during the litigation surrounding the plaintiff's claim for attorneys' fees.

superseded the 50% provision in the May, 1992 agreement. *Id.*

During the course of the attorneys' fees litigation, the defendants became aware of the fee arrangements between Virani, Hall & Phillips, and TAF, and argued that the statutory attorneys' fee award should be lowered in light of those "fraudulent and unconscionable" arrangements. (Report and Recommendation of United States Magistrate Judge, dated June 10, 1993, pg. 3). However, adopting the Report and Recommendation of the Magistrate Judge, this Court rejected the argument on the ground that the statutory attorneys' fee provision does not prohibit such private agreements between parties and their attorneys. (Report and Recommendation of United States Magistrate Judge, dated June 10, 1993, pg. 3; Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge, dated July 23, 1993). *See Venegas v. Mitchell*, 495 U.S. 82, 86-90 (1990).

At that time, however, the Court was unaware of any dispute between the plaintiff and his attorneys regarding the fee arrangements. In fact, at a hearing before the Magistrate Judge, John Phillips of Hall & Phillips represented to the Court that Mr. Virani was "fully aware, Your Honor, and supports the fee arrangements. There's no dispute here with Mr. Virani." (Rizzo Decl., Exhibit pg. 9:2-3). *See id.* at pg. 44:15-16 ("Mr. Virani, as I've represented before, fully understood all these relationships.").

At the conclusion of the fee litigation, the Court awarded $316,500 in fees. (*See* Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge, pg. 1). Defendants filed a timely Notice

of Appeal in connection with the fee award. (*See* Motion for Order Setting Status Conference or Briefing Schedule, Exhibit D). However, before the appeal was briefed, defendants reached a settlement with Hall & Phillips which permitted defendants to pay the attorneys' fees on an installment basis. (*See* Rizzo Decl.). Believing that Mr. Virani's approval of the settlement was necessary, and that he would in fact approve it, defendants dropped the appeal. *Id.* When defendants executed a settlement agreement with Hall & Phillips, Virani refused to sign. *Id.*

Virani now claims that he was unaware of the arrangements between TAF and Hall & Phillips, and claims an interest in both the attorneys' fees and TAF's share of the settlement proceeds. (Virani Decl., ¶¶ 4-5), 12). Unsure of whether the fees should be paid to Virani or Hall & Phillips, the defendants filed a Motion for an Order Setting Status Conference or Briefing Schedule, and requested leave to seek sanctions against Hall & Phillips for alleged misrepresentations during the fee litigation. Alnoor Virani joined this Motion. In addition, the Government filed a Motion for Declaration of Rights in connection with the settlement proceeds. The Government's Motion was later withdrawn when Virani and TAF agreed to deposit the current installment into a jointly controlled escrow account pending a resolution of their dispute.

After briefing the issue, the defendants urge the Court to vacate the fee award and permit the issue to be relitigated in light of these newly discovered facts. As a sanction for the alleged misrepresentations, the defendants request an award of attorneys' fees reasonably

expended in the course of the earlier fee litigation. Plaintiff Alnoor Virani requests an order permitting discovery relating to the fee arrangements between Hall & Phillips, TAF, and Virani. In addition, or in the alternative, Virani requests an order directing payment to him of the attorneys' fees and the full amount of the relator's share of the settlement proceeds.

TAF argues that his Court lacks jurisdiction over its dispute with Virani regarding the settlement proceeds. If the Court determines that it has jurisdiction, however TAF requests an order directing payment of 40% of the relator's share to TAF pursuant to its agreement with Mr. Virani. Hall & Phillips requests an order directing payment of the attorneys' fees to Hall & Phillips.

DISCUSSION

A. The Settlement Proceeds.

As noted above, the two agreements between Virani and TAF called for TAF to advance litigation expenses and lend its support to the action in return for 40% of any amount recovered by Virani. (Benson Decl., Exhibits B and D). Virani now argues, in essence, that he was fraudulently induced to enter into those agreements, and thus the entire relator's share should be awarded to him. TAF, on the other hand, argues that the agreements are valid, and that it is entitled to its share of the proceeds. However, as a threshold matter, TAF argues that this Court lacks jurisdiction over the contractual dispute between TAF and Virani.

According to Virani, the Court retained jurisdiction over these issues in its Order dismissing the lawsuit after the settlement. The plaintiff is incorrect. In an Order dated January 23, 1992, the Court granted the Government's motion to dismiss with prejudice, "with the exception of the following issues: (1) any claim by *qui tam* plaintiff Virani for attorneys' fees pursuant to the False Claims Act (31 U.S.C. § 3729, *et seq.*), and (2) the award to Virani from the proceeds of the settlement between the United States, Jerry M. Lewis Truck Parts and Equipment, Inc., and Steven Lewis, pursuant to the False Claims Act." (Order dated January 23, 1992, pp. 1-2). With that Order, the Court reserved jurisdiction over the fee litigation, and the decision as to what percentage of the settlement should be awarded to Virani pursuant to 31 U.S.C. § 3730(d)(1).[3] The Court did not reserve jurisdiction over the agreement between Virani and TAF governing the disposition of Virani's share of the proceeds between Virani and TAF.

Indeed, because TAF is no longer a plaintiff, the agreement between TAF and Virani is merely a private contract in which Virani apparently agreed to give TAF a share of his recovery in exchange for TAF's agreement to advance litigation expenses. The Court approved a settlement agreement between the Government and the defendants, and subsequently determined that Virani was

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[3] Section 3730(d)(1) provides that in cases where the Government intervenes, the *qui tam* plaintiff shall receive between 15% and 20% of the proceeds of the action or settlement of the claim, depending upon the extent to which the *qui tam* plaintiff substantially contributed to the case.

entitled to 20% of that settlement. Thus, Lewis must pay $4,250,250 to the Government, and the Government must pay 20% of that settlement to Virani. Whether Virani must now pay a percentage of his share to TAF is an issue to be resolved by TAF and Virani in a separate action.

B. The Statutory Attorneys' Fees.

(1) The Right to Recover Fees Under the Statute.

In contrast with the dispute over the settlement proceeds, the court clearly retained jurisdiction over the fee litigation. After more than a year of litigation, the Court awarded $316,500 in attorneys' fees. Now at issue is whether Virani or his attorneys are entitled to collect the fees, and/or whether the issue should be relitigated.

The parties agree that under fee-shifting statutes in general, it is the party, and not his attorney, who may seek an award of attorneys' fees. *Evans v. Jeff D.*, 475 U.S. 717 (1986) (because the right to seek attorneys' fees belongs to the party, not his attorney, the party may waive such fees as part of a settlement); *Venegas v. Mitchell*, 495 U.S. 82, 87 (1990) ("Section 1988 makes the prevailing **party** eligible for a discretionary award of attorney's fees.") (emphasis in the original). According to the plaintiff, these cases require payment of the fee award to the plaintiff rather than his former counsel.

Hall & Phillips, on the other hand, urges the Court to adopt the reasoning applied by the District Court in *United States of America, ex rel., Taxpayers Against Fraud, et al. v. Teledyne Industries, Inc., et al.*, No. CV 89-2765-WJR. In *Teledyne*, one of several *qui tam* plaintiffs argued that

he, rather than his attorney, was entitled to collect the statutory attorneys' fees. The Court disagreed, and held that the fees were to be disbursed to the plaintiff's counsel. (*See* Phillips Decl., Exhibit C).[4]

The *Teledyne* Court, like this Court, faced two lines of authority that are in tension with one another. On the one hand, recent Supreme Court cases indicate that statutory attorneys' fees belong to the party rather than his attorney. *See, e.g., Evans,* 475 U.S. at 731 (Congress "neither bestowed fee awards upon attorneys nor rendered them nonwaivable of [sic] nonnegotiable") and *Venegas,* 495 U.S. at 87 ("[I]t is the party, rather than the lawyer, who is [eligible for a discretionary award of attorneys' fees.]").

On the other hand, several Circuits have suggested that such fees must be paid to counsel. For example, in *Brandenburger v. Thompson,* 494 F.2d 885, 889 (9th Cir. 1974), the Ninth Circuit wrote that "the [fee] award should be made directly to the organization providing the services to ensure against a windfall to the litigant." *See also Rodriguez v. Taylor,* 569 F.2d 1231, 1245 (3rd Cir. 1977) ("[S]ince the object of the fee awards is not to provide a windfall to individual plaintiffs, fee awards must accrue to counsel."); *Plant v. Blazer Financial Services, Inc.,* 598 F.2d 1357, 1366 (5th Cir. 1979) ("[T]he fee once awarded becomes in effect an asset of the attorney, not the client."); *Freeman v. B & B Associates.,* 790 F.2d 145, 150 (D.C.Cir. 1986) (citing *Plant*).

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[4] Judge Rea's decision in *Teledyne* is currently on appeal before the Ninth Circuit. No. 94-56482 (9th Cir. 1994).

However, none of those cases addressed the precise issue raised in this action. They therefore are not controlling. For example, in *Plant*, the Court held that in a Truth in Lending Act case, the defendant may not setoff a statutory fee award against the plaintiff's outstanding debt to the defendant. The Court acknowledged several statutes, such as Title VII of the Civil Rights Act, the Fair Labor Standards Act, and the Clayton Act, as well as cases interpreting them, which "appear to regard the attorney's fees as the property of the plaintiff." *Plant, supra*, 598 F.2d at 1366. However, the Court distinguished those statutes and cases on the ground that they did not involve the unusual setoff issue involved in the Truth in Lending Act claim. *Id.* Thus, *Plant* is best understood as being limited to its facts. *See also Freeman*, 790 F.2d at 150 (citing *Plant* for the same proposition).

In *Brandenburger* and *Rodriguez*, the issue was whether a plaintiff who is represented by a non-profit organization which does not charge for its services may be awarded statutory attorneys' fees under 42 U.S.C. § 1988. In both cases, the courts held that the fee arrangement with counsel does not affect a plaintiff's eligibility for fees. Those cases, however, did not involve a dispute over fees between the plaintiff and his attorneys. Therefore, the statements to the effect that fees should accrue to counsel were dicta, not necessary to the resolution of those cases.

Moreover, the concern over a "windfall to the plaintiff expressed in *Brandenburger* and *Rodriguez* implies that the statutory fee provision is designed to compensate plaintiffs for attorneys' fees actually incurred in litigation. Any amount of fees collected by the plaintiff rather

than his attorney would therefore be a "windfall" because it was not used to pay attorneys' fees. However, the Supreme Court has held that the statutory award is completely independent of any financial arrangement between the plaintiff and his attorney.

For example, in *Blanchard v. Bergeron*, 489 U.S 87 (1989), the Court held that the statutory fee award may exceed the amount of a contingency fee agreed upon by the plaintiff and his attorney. The Court noted that a "reasonable" fee means "reasonable compensation, in light of all of the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, no more and no less. Should a fee agreement provide less than a reasonable fee calculated in this manner, the defendant should nevertheless be required to pay the higher amount." *Blanchard, supra*, 489 U.S. at 93. In other words, "plaintiff's recovery will not be reduced by what he must pay his counsel." *Id.*, 489 U.S. at 94.[5]

Of course, the *Blanchard* Court did not consider the issue of whether plaintiff, as opposed to his attorney, is entitled to keep the difference between the fee agreement and the amount awarded by the court. However, the Court has consistently held that the statutory fee provisions do not control the relationship between a prevailing plaintiff and his attorney. In *Venegas*, the Court held that § 1988 does not "constrain[ ] the freedom of the civil rights plaintiff to become contractually and personally

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[5] *See also Blum v. Stenson*, 465 U.S. 886 (1984) (plaintiff who is represented free of charge by nonprofit legal aid organization is entitled to a fee award calculated on the same basis as a plaintiff represented by private counsel).

bound to pay an attorney a percentage of the recovery, if any, even though such a fee is larger than the statutory fee that the defendant must pay to the plaintiff." 495 U.S. at 87. Again, *Venegas* does not address the precise issue raised by this case, because it holds only that a prevailing party may pay his attorney more than the statutory fee award. It says nothing about the party's ability to pay the attorney less than the award and keep the difference. However, *Blanchard* and *Venegas*, read together, can be read for the proposition that the statutory fee award is independent of the financial arrangement between the prevailing party and his attorney. In other words, "§ 1988 controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer." *Venegas, supra*, 495 U.S. at 90.

Thus, in *Blanchard*, *Blum*, and *Venegas*, the Supreme Court made clear that all prevailing litigants are treated the same under fee-shifting statutes. Regardless of the financial arrangements between the litigant and his attorney, the court must award the litigant a reasonable amount of fees. This fulfills the underlying purpose of such provisions: to ensure that each litigant has available a reasonable amount of funds with which to obtain an attorney. Having done so, the court need not concern itself with any "windfall" that might accrue to the plaintiff as a result of the plaintiff's fee arrangement with counsel. Thus, the concern expressed in *Brandenburger* and *Rodriguez* regarding potential "windfalls" to plaintiffs is inconsistent with the Supreme Court's approach to

statutory fee awards as expressed in *Blanchard*, *Blum*, and *Venegas*.[6]

The *Teledyne* Court tried to reconcile these two lines of authority by distinguishing between the party's standing to request fees under *Evans* and *Venegas*, and the right to receive those fees. "Deciding that an attorney has no standing to request attorneys' fees under the False Claims Act, however, does not resolve the question of whether a *qui tam* plaintiff may personally collect amounts which have been designated as an award of attorneys' fees." (Phillips Decl., Exhibit C, pg. 2). Citing *Rodriguez*, *Plant*, and *Freeborn*, the *Teledyne* Court held that an attorney is entitled to collect a statutory award, although only the plaintiff has standing to request them.

However, this distinction between standing to seek attorneys' fees and the right to receive those fees cannot

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[6] Moreover, in *Evans*, the Court held that the District Court may not refuse to approve a settlement in a civil rights case merely because the settlement is conditioned upon a waiver of attorneys' fees. Because the right to seek attorneys' fees belongs to the party, the party is free to waive attorneys' fees, or assign them to counsel. *Evans*, 475 U.S. at 730-31 ("Congress bestowed on the prevailing party (generally plaintiffs) a statutory eligibility for a discretionary award of attorneys' fees in specified civil rights actions. It did not prevent the party from waiving this eligibility anymore than it legislated against assignment of this right to an attorney. . . . ") (emphasis original). If, as Hall & Phillips contends, statutory attorneys' fees must be awarded to counsel rather than the plaintiff, there is no reason why a plaintiff would have to assign the right the fees to counsel. Counsel would already have those rights.

be sustained. A fundamental concept underlying the doctrine of standing is that, with few inapplicable exceptions, one may not sue on behalf of someone else. *Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interest of third parties."). Thus, as a general rule, the right to seek and the right to receive a remedy belong to the same person. If the party, not the attorney, has standing to seek an award of attorneys' fees, then it is the party, and not the attorney, who has the right to collect such fees.

In addition to the distinction between standing and the right to collect fees, *Teledyne* relied upon *United States, ex rel., Gibeault v. Texas Instruments Corp.*, 25 F.3d 725 (9th Cir. 1994) for the proposition that the attorney, rather than the litigant, is entitled to collect fees. In *Gibeault*, a *qui tam* plaintiff filed suit under the False Claims Act, and the Government initially declined to intervene. The parties reached an agreement in which the defendant agreed to pay $300,000 in attorneys' fees in exchange for dismissal with prejudice and a stipulation that any deficiencies in defendant's products were remedied to the satisfaction of the Government.

The Government sought to intervene and object to the settlement, but was denied by the District Court. Among other things, the Government claimed that the $300,000 in attorneys' fees constituted a settlement under the False Claims Act. The United States is entitled to at least seventy percent of any such settlement under 31

U.S.C. § 3730(d)(2).[7] The Ninth Circuit held that the Government should be permitted to intervene, and remanded for a hearing on the Government's objections because it had shown "good cause" for such a hearing.

Although *Gibeault* does not directly address the issue, the *Teledyne* Court concluded that *Gibeault's* reasoning supports the view that counsel, rather than the client, is entitled to collect statutory attorneys' fees. This conclusion reads too much into *Gibeault*. The *Gibeault* Court held that the Government had shown "good cause" for a hearing on its objections to the settlement because it appeared as though part of the $300,000 in "attorneys' fees" might have been a hidden settlement, designed to circumvent § 3730(d)(2) and prevent the Government from taking its share. The fact that parties cannot settle a case and prevent the Government from recovering simply by labelling the settlement payment "attorneys' fees" does not mean that the attorney, rather than the plaintiff, is entitled to collect fees awarded by the court.

Therefore, in light of the Supreme Court's decisions in *Evans*, *Blum*, *Blanchard*, and *Venegas*, this Court declines to adopt the reasoning of *Teledyne*. The plaintiff, not his attorney, is entitled to collect the statutory fee award.

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[7] Section 3730(d)(2) provides that where the Government does not intervene, the *qui tam* plaintiff is entitled to between 25% and 30% of any damages or settlement. Thus, the Government is entitled to at least 70% of any settlement or recovery.

(2) The Effect of the Retainer Agreement.

Even if Virani is entitled to collect the attorneys' fees under the statute, Hall & Phillips claims that he assigned his rights to such fees in the retainer agreement.[8] Such an assignment is permissible under the fee-shifting statutes. *Evans*, 475 U.S. at 730-31. However, Virani claims that he was fraudulently induced to enter into the agreement, and that the agreement is therefore void. One threshold issue, though, is whether this dispute should be resolved by this Court.

Of course, this Court may examine contingency fee agreements in order to avoid unreasonable fees. *Venegas v. Skaggs*, 867 F.2d 527, 532 (9th Cir. 1989) ("[A] district court must review a contingent fee in a civil rights case to ensure that the contingent fee is reasonable."), *aff'd sub nom, Venegas v. Mitchell*, 495 U.S. 82 (1990).[9] However, this Court is not being asked to consider the reasonableness of a contingency fee between plaintiff and his attorneys. The plaintiff assigned his statutory fees to his attorneys,

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[8] The agreement provides that "[t]he client hereby assigns the attorneys any amounts for costs, expenses, and attorneys' fees for work on the case awarded by the court or agreed to by the parties. Under no circumstances will the client oppose, or assist in opposing, any such request for attorneys' fees made by the attorneys nor will he contest or dispute the amount of fees requested thereby." (Benson Decl., Exhibit C).

[9] In *Venegas v. Mitchell*, the Supreme Court affirmed the Ninth Circuit's holding that a statutory fee award should not be limited to the amount of a contingency fee agreed on by the prevailing plaintiff and his attorney. However, the Court "ha[d] no occasion to address the extent of the federal courts' authority to supervise contingent fees."

and assigned a percentage of his recovery to TAF. The real issue is whether the plaintiff was aware of all of the relevant facts when he entered into the agreements, and, if not, whether he is entitled to any remedy.

Consistent with this Court's analysis of the Supreme Court's opinions in *Evans*, *Blum*, *Blanchard*, and *Venegas*, this issue should be resolved in a separate proceeding. The Court has awarded $316,500 in statutory fees, and has determined that under the statute the plaintiff, not his attorney, is entitled to collect those fees. Once the plaintiff has collected those fees, he may abide by his retainer agreement with Hall & Phillips, or he may attempt to keep the money. Of course, if he keeps the money, Hall & Phillips may sue for breach of the retainer agreement, and Virani will no doubt defend by asserting that he was fraudulently induced into signing it. In any event, the Court did not retain jurisdiction over these issues. The Court awarded fees to the plaintiff, who was entitled to seek them. Whether plaintiff has agreed to pay those fees to his attorneys' is a separate issue that is not controlled by the fee-shifting statute, and is therefore not properly a part of this proceeding. *See, e.g., Venegas, supra,* 495 U.S. at 90.[10]

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[10] In so holding, this Court obviously disagrees with *United States ex rel. Taxpayers Against Fraud v. General Electric*, 41 F.3d 1032 (6th Cir. 1994), in which the Sixth Circuit remanded to the District Court for consideration of many of the issues raised by Virani and the defendants. *General Electric*, however, is not binding on this Court.

(3) Defendants' Request to Reconsider the Fee Award.

In light of Virani's recent allegations, the defendants have asked this Court to vacate the fee award and reconsider the appropriate amount of attorneys' fees. As noted above, this Court has already determined a reasonable award of attorneys' fees. (Report and Recommendation of United States Magistrate Judge, dated June 10, 1993; Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge, dated July 23, 1993). Virani's purported lack of knowledge of the relationship between TAF and Hall & Phillips does not change the reasonableness of the fee award (although it may affect the plaintiff's obligation to pay his attorneys). Thus there is no reason to reconsider the fee award in light of the plaintiff's recent allegations.

C. Sanctions.

Having reviewed the record, the Court does not perceive any basis upon which to impose sanctions. Therefore, the defendants' request for sanctions is DENIED.

CONCLUSION

The defendants are ordered to pay the statutory fee award to *qui tam* plaintiff Alnoor Virani. The defendants' request for discovery and reconsideration of the fee award, and the motion for sanctions, are DENIED.

IT IS SO ORDERED.